

No. 9166.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ERIC ARTHUR CLEUGH,

Appellant,

vs.

ALEXANDER STRAKOSCH,

Appellee.

PETITION FOR REHEARING.

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*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

Comes now Alexander Strakosch by Milton M. Cohen, R. Dean Warner, Alfred F. MacDonald and Milton M. Cohen, Jr., his attorneys, and respectfully petitions the court for a rehearing of the above cause on the following grounds:

I.

That this Honorable Court erred in rejecting appellee's contention that there was no evidence warranting the belief that he participated in any of the crimes here in question.

II.

That the decision of this Honorable Court reversing the order of the District Court of Appeal is based in part upon the theory that it is reasonably inferable from the

facts stated in the depositions that appellee was engaged in a conspiracy and that the crimes in question were committed in furtherance thereof, whereas the crime of conspiracy is not alleged or charged against appellee in the amended complaints filed below.

ARGUMENT.

On page six of its opinion, the court names the victims of the crimes and states that "Spiro and his associates" committed the crimes. The opinion then points out that:

"One of Spiro's associates was appellee. Persons with whom Spiro had dealings were advised by Spiro in appellee's presence that appellee was Spiro's 'assistant'. This was confirmed by appellee's conduct. Appellee assisted in procuring for Spiro and his associates the offices in which they, as Maclean & Henderson and S. R. Bunt & Company, carried on their fraudulent operations. Appellee had charge of and managed those offices, employed and paid the office help, opened mail, dictated and signed letters, sent and received telephone messages, ordered and paid for printing, collected and deposited money for Maclean & Henderson and S. R. Bunt & Company, and was well aware of the fraudulent and criminal character of the 'business' in which they, and he, were engaged."

There can be no question but that the evidence shows that appellee was associated with Spiro and that he did the things set forth in the language above quoted, but it does not follow that appellee was Spiro's associate or assistant in Spiro's criminal activities. In fact, there is not one scintilla of evidence to show that appellee par-

ticipated in any of the crimes committed by Spiro and his criminal associates. Particularly is there no evidence whatsoever tending in the slightest degree to raise even an inference that appellee was "well aware of the fraudulent and criminal character of the business in which they, and he, were engaged."

From a study of the record, one is irresistibly led to the conclusion arrived at by Judge Hollzer, as set forth in his opinion attached to appellee's answering brief, that as to each of the nine defrauded witnesses, appellee at no time made any representations or deal with them in any unlawful manner, or in any manner whatsoever, from which it could be inferred that he had knowledge of the criminal activities of Spiro and his criminal associates.

Appellant would have it appear that as argued in his reply brief "Page Twenty" that evidence of mere association with parties committing crimes was sufficient evidence to show reasonable or probable cause to believe the accused guilty of crimes committed by the persons with whom he associated. This, of course, is an absurdity because it is elementary and fundamental that mere association with persons committing crimes is not sufficient to constitute probable cause. If it were otherwise, each one of the typists and employees of a principal would be held guilty because of their association with the principal. Guilt arising by reason of aiding a principal can only be established by knowledge of the unlawful purpose of the principal, coupled with the intention to aid, abet and participate in the crime.

In its opinion, this Honorable Court rejects appellee's contention that there was no evidence warranting a belief that he participated in any of the crimes here in question for the reasons as stated by the court that:

“There is evidence that some of the crimes were participated in by a person calling himself Richards, others by a person calling himself Mortimer, one by a person calling himself Simpson, and one by a person calling himself J. Elphinstone. ‘Richards’ claimed to be the manager of Maclean & Henderson. ‘Simpson’ and ‘J. Elphinstone’ claimed to be agents of Maclean & Henderson. ‘Mortimer’ claimed to be the agent of both Maclean & Henderson and S. R. Bunt & Company. Stenographers and typists working in the offices of Maclean & Henderson and S. R. Bunt & Company never knew anyone by the name of Richards, Mortimer, Simpson or J. Elphinstone. They did know and take orders from appellee, who was in fact the manager of both offices. It is possible and, we think, highly probable that the names ‘Richards’, ‘Mortimer’, ‘Simpson’ and ‘J. Elphinstone’ were mere aliases used by appellee.”

Footnote 13 of the opinion recites that “Other associates of Spiro were Samuel Taylor, William Underhill and John William Robert Elphinstone.” The record shows that these men were placed upon trial for their alleged crimes, and it further shows that they were, or at least some of them were, aiders and abettors of Spiro in his criminal activities.

We submit that this Honorable Court is not justified in holding that there was evidence warranting a belief that appellee participated in the crimes by drawing unwarranted inferences and negative reasoning. It is just as probable that Taylor, Underhill and Elphinstone, or any other person criminally associated with Spiro, were the persons committing the crimes and calling themselves Richards, Mortimer, Simpson and so forth.

This Honorable Court in its opinion holds that because stenographers working in the offices of Maclean & Henderson and S. R. Bunt & Company never knew anyone by the names of Richards, Mortimer, Simpson or Elphinstone, and because they did know and take orders from appellee, that the names Richards, Mortimer, Simpson and Elphinstone were mere aliases used by appellee. To our minds the inference is not justified, nor is the statement that appellee was in fact the manager of Maclean & Henderson and S. R. Bunt & Company. The record shows that it was stated by Spiro that he was leaving appellee in charge of one of the offices during the time he was away on a trip, but we do not believe that the conclusion is justified from the record that appellee "was in fact the manager of both offices."

We submit that there is absolutely nothing in the record to justify the conclusion of this court that it is "highly probable that the names 'Richards', 'Mortimer', 'Simpson' and J. Elphinstone' were mere aliases used by appellee."

In its opinion this Honorable Court states:

“Moreover, from the facts stated in the depositions, it is reasonably inferable—and, we think, obvious—that Spiro and his associates, including appellee, were engaged in a conspiracy, and that the crimes in question were committed in furtherance thereof. It therefore makes no difference whether appellee was present or absent at the commission of the acts constituting the crimes, or whether he did or did not directly participate in their commission. 14 Am. Jur., Criminal Law, Para. 80, pp. 823, 824.”

We agree with the court that it is obvious from the facts stated in the depositions that Spiro and certain associates were engaged in a conspiracy and that the crimes in question were committed in furtherance thereof, but we take decided issue with that portion of the opinion which states that it is obvious that appellee was engaged in a conspiracy as an associate of Spiro. It is our contention that there is absolutely no evidence whatsoever in the entire record to raise an inference that appellee was a conspirator with Spiro in his unlawful activities. And even if such an inference could reasonably be drawn from the evidence, we point out to the court that the appellee was not charged with the crime of conspiracy in the complaints filed below. He is charged directly with the specific crimes of fraudulent conversion and obtaining money or securities by false pretenses.

Conclusion.

We sincerely urge this Honorable Court to consider that both in the record and on the face of the court's opinion nothing is made to appear from which a reasonable inference could be drawn that the appellee did any of the acts which the record shows he did do with guilty knowledge and felonious intent.

Further, that the court reconsider its holding that the fact that it was established by the evidence that crimes were committed by persons known as Richards, Mortimer, Simpson and J. Elphinstone afforded a sufficient basis for drawing an inference that simply because employees working in the offices of the two companies never knew anyone by such names, appellee was therefore a participant in the crimes.

The fact that the stenographers and typists working in the offices of Maclean & Henderson and S. R. Bunt & Company never knew anyone by the names of Richards, Mortimer, Simpson or J. Elphinstone is no proof or evidence that such parties were not actually in existence and using their own names and assisting Spiro in his unlawful transactions.

The fact is established by the record that appellee was known to, and gave orders to, the stenographers and typists working in the two offices. This court has held that the fact that the stenographers and typists did not know anyone by the names of Richards, Mortimer, Simp-

son or J. Elphinstone constituted sufficient evidence to show that appellee participated in the crimes.

For all the foregoing reasons we respectfully submit that this Honorable Court should grant a rehearing of this case.

Respectfully submitted,

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By ALFRED F. MACDONALD,
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Certificate of Counsel.

I hereby certify that I am one of the attorneys for the appellee in the above entitled cause and that in my opinion the foregoing Petition for Rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

ALFRED F. MACDONALD.